

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO**

In re:)	Chapter 11
)	
LEVEL PROPANE GASES, INC., <i>et al.</i>)	Case No. 02-16172
)	Jointly Administered
Debtors.)	
)	Randolph Baxter
)	
)	Adversary Proceeding No. 09-01118
)	
MAXUS CAPITAL GROUP, LLC,)	
)	
Plaintiff,)	
)	
v.)	
)	
MARK UHRICH, PLAN)	
ADMINSTRATOR,)	
)	
Defendant.)	

**DEFENDANT’S BRIEF IN OPPOSITION TO MOTION OF
TAL FINANCIAL SERVICES, INC. TO INTERVENE**

Defendant Mark Uhrich, the Plan Administrator for the Consolidated Estate of Level Propane Gases, Inc., and its affiliated debtors and former debtors in possession in the above-captioned chapter 11 cases (the “Plan Administrator”), opposes the motion of TAL Financial Services, Inc. (“TAL”) to intervene (the “Motion”) in this adversary proceeding. In that TAL has failed to comply with the requirements of Fed.R.Civ.P. 24(c), the Plan Administrator respectfully moves this Court for entry of an order denying the relief requested in the Motion. As set forth in greater detail below, the relief requested in the Motion should be denied for failure to comply with the requirements of Fed.R.Civ.P. 24(c).

Federal Rule of Civil Procedure 24(c) provides that:

A motion to intervene **must** be served on the parties as provided in Rule 5. The motion **must** state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Fed.R.Civ.P. 24(c) (emphasis supplied). “Compliance with these requirements is mandatory.” 6

Moore’s Federal Practice, § 24.20 (Matthew Bender 3d ed.). Their purpose is clear:

[A] district court will be unable to evaluate a motion to intervene, and the existing parties will be unable to make a meaningful response to the motion, unless they know exactly what claims or defenses the movant proposes to bring to the lawsuit.

A proposed pleading is, therefore, an essential part of the motion.

Id. Cf. *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309, 314 (6th Cir. 2005) (district court abused its discretion in denying motion to intervene based on failure to attach pleading where motion alleged claim, pleading was subsequently attached to motion for relief from judgment, and no party claimed prejudice from failure).

TAL has failed to comply with the requirements of Rule 24(c) in their entirety. TAL did not serve a copy of the Motion on the Plan Administrator pursuant to Fed.R.Civ.P. 5. The certificate of service appended to the Motion states merely that “[n]otice of this filing will be sent to all parties by operation of the Court’s electronic filing system.” However, at the time the Motion was filed on April 6, 2009, electronic notice would not have been sent to the Plan Administrator since his counsel had yet to enter an appearance in this proceeding. Indeed, the electronic notice received by TAL upon filing the Motion would have expressly indicated that notice would **not** be mailed electronically to the Plan Administrator. TAL plainly knew that the Plan Administrator never received service of the Motion. As a result, the purported service on “all parties” was ineffective. See Fed.R.Civ.P. 5(b)(E) (service by electronic means “is not effective if the serving party learns that it did not reach the person to be served”).

Nor did TAL attach or otherwise file a proposed pleading with the Motion. A motion to intervene “may not just ‘adopt’ the pleadings of an original party, nor may it merely describe a

future pleading. . . .” *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 595 (7th Cir. 1993) (quoting *Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir. 1993)). Even under the “permissive” approach discussed by the court in *Providence Baptist Church*,¹ TAL’s disregard for the Rule’s requirements must be considered fatal to the Motion since TAL fails to articulate the basis for the claim or claims it wishes to allege in this proceeding. It merely asserts that in addition to seeking revocation of confirmation – the relief already claimed by the existing plaintiff – it “further seeks to recover the contract value of its leases with Level Propane Gases, Inc. which it compromised as a direct consequence of the fraud alleged in Maxus’ complaint” and “has a complaint in the tens of thousands of dollars. . . .” (Motion at pp. 2 and 4). At no point does TAL identify either the “leases” or the “compromise” it claims to be at issue. No factual or legal basis for the relief it purports to seek is alleged or can be discerned from its vague and conclusory assertions. The Court has no way of telling whether TAL can even state a valid, cognizable claim for relief, a prerequisite for intervention. *See Solien v. Misc. Drivers & Helpers Union, Local No. 610*, 440 F.2d 124, 132 (8th Cir.), *cert. denied sub nom.*, 403 U.S. 905 (1971); *Diehl v. United States*, 438 F.2d 705, 711 (5th Cir.), *cert. denied*, 396 U.S. 959 (1969); *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451, 455 (2d Cir.), *cert. denied*, 396 U.S. 959 (1969).

These same deficiencies prevent the Court from determining that TAL possesses a “significant legal interest” that might possibly be impaired absent intervention. As recognized in

¹ In *Providence Baptist Church*, the court identifies a split among the circuits in their approach to enforcement of Rule 24(c) and finds that a majority of the circuits (4 to 3) favor “a permissive interpretation of the rule.” 425 F.3d at 313-14. At no point, however, does the court state that it is adopting such interpretation; rather, it merely concludes that “[t]he district court’s exacting application of Rule 24(c) is not in accord with the jurisprudence of a majority of the Circuits, which favor a permissive approach, or with the rationale applied by other circuits to approve strict enforcement of Rule 24(c) in some circumstances. . . .” *Id.* at 314-15.

the authority relied upon by TAL, “[t]he inquiry into the substantiality of the claimed interest is necessarily fact-specific.” *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). It is impossible to conclude that the legal interest asserted by TAL even exists, much less that such interest is “substantial,” when the only facts alleged by TAL in the Motion are that it at one time had some “leases” with Level Propane that it “compromised.”

Nor is it possible to understand how such “interest,” if it exists, could be impaired based on the generalized assertions contained in the Motion. TAL never explains or offers authority in support of its bald assertion that unless the confirmation order entered by this Court on October 9, 2008, is revoked, “its ability to seek restoration of its settlement in this Court due to fraud is entirely foreclosed.” (Motion at p. 4). Without knowing, at the very least, what “settlement” and what “fraud” TAL is talking about,² this assertion is simply incomprehensible and cannot even be addressed as a legal proposition. The burden on TAL with respect to the “impairment” element of Rule 24(a)(2) is, as it notes, minimal. The allegations in the Motion do not, however, even come close to showing, either factually or legally, how impairment of TAL’s asserted legal interest is possible if intervention is denied.

Contrary to TAL’s contention, substantial prejudice to the Plan Administrator would arise if the Court were to grant the Motion under these circumstances. There can be no justification for exposing the Plan Administrator and the Consolidated Estate to the costs of responding to and defending against some unstated claim, the merits of which are, at this point, unknowable, and which appears wholly unrelated to the issue whether the confirmation order in these

² It must be noted that TAL’s generalized, conclusory assertions of “fraud” and “fraud on the court” do not come close to meeting the pleading requirements that it would have to meet in a complaint under Fed.R.Civ.P. 9(b). See *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 (6th Cir. 2005) (plaintiff claiming fraud must allege the time, place, and content of the alleged misrepresentations; quoting *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1993)).

proceedings should be revoked. Nor is there any reason to subject the Plan Administrator to the burden of responding to discovery and motion practice on behalf of multiple plaintiffs on the latter issue when TAL does not assert that its “interest” with respect to the revocation issue are not and would not be adequately protected by the existing plaintiff. Under these circumstances, TAL’s failure to comply with the requirements of Rule 24(c) cannot be treated as some mere “technical oversight” to be forgiven.

For the foregoing reasons and authorities cited, the Plan Administrator respectfully requests that the Court deny the Motion to Intervene and grant the Plan Administrator such other and further relief as the Court finds to be just and equitable.

Dated: May 22, 2009

Respectfully submitted,

/s/ Matthew J. Samsa

Mark A. Phillips (Ohio # 0047347)
Stuart A. Laven, Jr. (Ohio # 0071110)
Matthew J. Samsa (Ohio # 0084256)
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP
200 Public Square, Suite 2300
Cleveland, OH 44114
Phone: (216) 363-4500
Fax: (216) 363-4588
Email: mphillips@beneschlaw.com
slaven@beneschlaw.com
msamsa@beneschlaw.com

Attorneys for Mark Uhrich, Plan Administrator
of the Consolidated Liquidating Estate of
Level Propane Gases, Inc. et al.

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2009, a copy of the foregoing Brief in Opposition was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Matthew J. Samsa

One of the Attorneys for Mark Uhrich, Plan
Administrator of the Consolidated Liquidating
Estate of Level Propane Gases, Inc., et al.